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# Supreme Court of the United States

**October Term, 1978**
**No. 78-170**

BOARD OF EDUCATION, BRATENAHL, OHIO, LOCAL SCHOOL DISTRICT,
*Petitioner,*

vs.

STATE BOARD OF EDUCATION OF OHIO, DEPARTMENT OF EDUCATION OF OHIO, FRANKLIN B. WALTER, Superintendent of Public Instruction and Secretary, State Board of Education,
*Respondents.*

## REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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September 14, 1978

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## REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Questions are not answered by begging them.

Respondents manage to do just this by pretending serious constitutional questions are not here (and that only state issues are raised) by directing questions to earlier State Board orders that were disposed of by prior final judgments.

Respondents disguise the fact that those prior orders were *considered, vacated and held for naught* in the prior final judgments of August 24, 1973, in the statutory review

(A45), and of August 30, 1973, in the separate declaratory judgment action. (A67.)

The Ohio Board of Education (pp. 7-8) relies on cases wherein successive appeals have been taken to courts of last resort, in the *same* case.

Such cases are irrelevant. Here, final unappealed judgments separate the instant appeal from all previous appellate activity.

The judgments in the prior Bratenahl cases were not before the Ohio Supreme Court in March 1978. Even if they had been, that court could not constitutionally, in 1978, re-open them and then hold Bratenahl dissolved solely by administrative fiat, without notice or hearing. (A115.)

The State Board position, if adopted, would mark the end of the doctrine of *res judicata.*

The inexplicable departure from the fundamental tenets of *res judicata* by the Ohio Supreme Court in this case is evident from a journal entry of the Court of Appeals. That court had previously ruled in Bratenahl's favor twelve consecutive times. It most recently has said:

> "[T]he Supreme Court in *State, ex rel. Bd. of Education v. State Board of Education* (1978), 53 Ohio St. 2d 173 specifically stated that [Bratenahl] 'was properly dissolved on July 1, 1970, by the state board' having *apparently*[1] determined prior judgments of this Court and the Court of Common Pleas holding to the contrary to be void and of no effect since those judgments had become final prior to the institution of the proceedings which were on appeal before the Supreme Court in that case . . ." AS 8.[2]

1. Emphasis supplied throughout.



Where, as here, the State Board "lays bare its arbitrary action, or if the State law explicitly allows it to act arbitrarily, that is precisely the kind of State action which the Due Process Clause forbids." *Barksy v. Board of Regents,* 347 U.S. 442, 470 (1954) (Frankfurter, *J.,* dissenting).

Although the State Board now contends that this appeal somehow relates back to long terminated appeals taken from the February 1970 State Board Order—when this case was presented to the Ohio Supreme Court, the State Board insisted (on page 2 of the State Board's brief) that:

> *"the origin of this appeal is the October 14, 1974,* unanimous resolution and order of the State Board * * *."

Because the State Board chooses to rely upon sleight-of-hand, it leaves unanswered critical constitutional issues, viz.:

(1) The State Board's Order would destroy the Bratenahl School System and take its property, as the Supreme Court of Ohio put it, "despite the fact *there was no notice or opportunity to be heard* afforded Bratenahl." (A116.)

(2) The State Board's Order would destroy rights vested in Bratenahl by two final judgments (of

2. AS refers to the annexed supplementary Appendix of Bratenahl setting forth the Court of Appeals journal entry in Case No. 78 AP-414, entered June 29, 1978. Since the State Board, as Appendix C, attaches the Complaint and Notice of Appeal from this journal entry, Bratenahl attaches the journal entry.

August 24, 1973 (A45), and August 30, 1973 (A67)) which this Court's cases brand a denial of due process.

(3) The State Board would destroy Bratenahl by applying the *old* law of 1968, and not the *new*, viz.:

(a) The standard requiring 240 pupils in a new high school (which Bratenahl could not meet) was changed to require instead the offering of 55 units of credit (which Bratenahl could, did, and does meet).

(b) The statute which, as of July 1, 1968, required a school system to maintain twelve grades (which Bratenahl has maintained since 1971) was changed by the legislature to eliminate the critical date, July 1, 1968, on which the State Board plants its case.

The State Board's failure to deal with these critical issues is eloquent confession by it that it has no answer.

Instead of answering, the State Board urges two arguments—irrelevant to any issue now here. These two arguments do nothing to illuminate the issues.

*First*: The State Board disparages Bratenahl's (p. 3) "importing selected black students * * *." These students, resident and non-resident alike, are not "selected," they *elect*, voluntarily, to come. The fact is that 25% of the student body is black. Here is a case of school integration that has worked successfully for ten years. It deserves encouragement from the State Board.

*Second*: The State Board alleges that the Bratenahl High School (p. 3) "never met even the legal minimum standards for a high school in the State of Ohio." Even if



if this were true, it would be no defense to the State's denial of constitutional rights.

The Court of Appeals, speaking as of December 16, 1976 (A81), observed that, as of 1973, more than three years earlier, out of 272 State standards, "some deficiencies were noted" (A93), as to which the Court of Appeals found:

"The overwhelming majority of the deficiencies noted relate to facilities, rather than to the educational qualities." (A93.) [This was *before* Bratenahl in 1974 built its new high school.]

The Court of Appeals further found:

"Many of the deficiencies are quite technical in nature and easily corrected. For example, the State Board found that the band class was not scheduled for the required clock hours since the State Board considered the band class a laboratory class, rather than an academic class, the distinction being whether or not homework is required." (A93.)

The Court of Appeals gave as "another example," the State Board's finding that in 1973:

"one teacher is assigned subjects for which she does not hold a valid certificate." (A93-A94.)

Upon looking into this proof of deficiency, the Court of Appeals found:

"The evidence indicates, however, that the teacher in question holds a Ph.D. in English and teaches Journalism and Drama, as well as English. The State Board apparently will not recognize the certification to teach English to allow such teacher also to teach Journalism and Drama, although it appears that it is primarily a matter of having the teacher's certificate modified to

include those courses which obviously are closely related to English." (A94.)

The fact is, as the Court of Appeals further found:

"In many respects, Bratenahl far exceeded minimum standards." (A96.)

## CONCLUSION

Only this Court can guarantee to Bratenahl the protection the Constitution gives to it.

To that end the Writ should issue.

Respectfully submitted,

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September 14, 1978



## APPENDIX S (SUPPLEMENTAL)

## JOURNAL ENTRY OF THE COURT OF APPEALS IN CASE NO 78 AP-414

(Entered June 29, 1978)

No. 78AP-414

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

STATE OF OHIO, *ex rel.*, BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
*Relator,*

v.

STATE BOARD OF EDUCATION OF OHIO,

and

DEPARTMENT OF EDUCATION OF OHIO,

and

FRANKLIN B. WALTER, Secretary, State Board of Education of Ohio,

and

SUPERINTENDENT OF PUBLIC INSTRUCTION,
*Respondents.*

JOURNAL ENTRY

Relator having filed a motion to expedite the hearing of this original action in prohibition and mandamus and in consideration thereof the court finds that the complaint does not state a claim upon which relief can be granted,

since the Supreme Court in *State, ex rel. Bd. of Education v. State Board of Education* (1978), 53 Ohio St. 2d 173, specifically stated that relator "was properly dissolved on July 1, 1970, by the state board" having apparently determined prior judgments of this court and the Court of Common Pleas holding to the contrary to be void and of no effect since those judgments had become final prior to the institution of the proceedings which were on appeal before the Supreme Court in that case and because a 1975 amendment to a statute can have no effect with respect to a school district which was dissolved in 1970, and accordingly the said decision of the Supreme Court is res judicata on the issues attempted to be raised herein.

Accordingly, this court hereby sua sponte dismisses this action for failure of the complaint to state a claim upon which relief can be granted.

/s/ DEAN STRAUSBAUGH
*Judge*

/s/ ALBA L. WHITESIDE
*Judge*

/s/ ARCHER E. REILLY
*Judge*